Rule 5, Ariz. R. Crim. P.

PRELIMINARY HEARING – Limited discovery at preliminary hearing ……..Revised 12/2009

Because the only purpose of a preliminary hearing is to determine if there is probable cause to believe the defendant committed an offense, many matters that are integral to a trial are, at best, incidental to a preliminary hearing. For example, "Discovery derived at a preliminary hearing is a very limited one." *State v. Superior Court*, 122 Ariz. 594, 596, 596 P.2d 732, 734 (App. 1979). In *State v. Canaday*, 117 Ariz. 572, 576, 574 P.2d 60, 64 (App. 1977), the Court of Appeals held that it may be impossible for the State to comply with trial-like discovery requirements at a preliminary hearing because the case may be incomplete. Thus, critical evidence may still be undiscovered and unavailable*. See also State v. Bojorquez*, 111 Ariz. 549, 553-554, 535 P.2d 6, 10-11 (1975) [purpose of preliminary hearing is not to facilitate discovery; discovery is incidental effect of hearing process].

The scope of a preliminary hearing is restricted to whether or not probable cause exists to bind the defendant over to Superior Court for trial. Rule 5.3(a)*,* Ariz. R. Crim. P.*; see also State v. Clark,* 126 Ariz. 428, 431-32, 616 P.2d 888, 891-92 (1980). In *Clark,* the defense sought to question a confidential informant prosecution witness about his name and address. On appeal, the Court stated that it was not error to limit cross-examination at the preliminary hearing to probable cause issues:

> It is not the purpose of the preliminary examination to provide a means for the discovery of evidence. *State v. Bojorquez*, 111 Ariz. 549, 535 P.2d 6 (1975). The Rules of Criminal Procedure provide a separate and adequate means for the defense to discover the evidence.

Id. at 432.

See also State v. Superior Court, 100 Ariz. 236, 241, 413 P.2d 264, 268 (1966) [purpose of preliminary examination is to determine if probable cause exists to believe defendant is guilty as charged]. "The purpose of a preliminary hearing and a grand jury proceeding is the same. They are to determine whether there is probable cause to believe the individual committed an offense." *State v. Neese,* 126 Ariz. 499, 502, 616 P.2d 959, 962 (App. 1980) *quoting State v. Lenahan,* 12 Ariz. App. 446, 449, 471 P.2d 748, 751 (1970).

Because the only issue at a preliminary hearing is whether or not probable cause exists, a committing magistrate (that is, a justice of the peace or Superior Court Judge sitting as a magistrate) may not order the pre-testimonial disclosure of documents related to a preliminary hearing. *See State ex rel. Berger v. Justice Court*, 112 Ariz. 24, 536 P.2d 1042 (1975). In that case, on the defendants' motion, the justice of the peace ordered disclosure of the County Attorney's entire file, including transcripts of telephone and in-person conversations. *Id*. at 25, 536 P.2d at 1043. The Arizona Supreme Court ruled that the justice of the peace exceeded his authority in ordering the production of the entire prosecution file. *Id*. at 25-26, 536 P.2d at 1043-44 (1975). While the defense had the right to examine the police reports that police officers had used to refresh their memories

before they testified at the preliminary hearing, the defense did not have a right to obtain all documents amassed by the prosecutor, including materials that would not be used at the preliminary hearing. *Id*. at 25, 536 P.2d at 1043 [citing *State ex rel. Corbin v. Superior Court*, 99 Ariz. 382, 409 P.2d 547 (1966)]. The Court explained that the type of full discovery sought by the defendants attaches only "after the defendant has been arraigned in the Superior Court, Rule 15.1(a) or after the indictment or information has been filed." *Id*., *see also State v. City Court,* 112 Ariz. 517, 543 P.2d 1146 (1975) ("The Rules of Criminal Procedure do not provide for full discovery at the preliminary hearing stage nor do the requirements of fairness").